United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

77-7188

United States Court of Appeals

For the Second Circuit

B

P/S

Docket No. 77-7188

REGAL HEALTH SPA, INC.,
Plaintiff-Appellant,

—against—

JEREMIAH T. WALSH, as Commissioner of the City of New York Department of Buildings, PAUL O'DWYER, as President of the New York City Council, HONORABLE LOUIS J. LEFKOWITZ, as Attorney General of the State of New York, and HONORABLE HUGH CAREY, as Governor of the State of New York,
Defendants,

JEREMIAH T. WALSH,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FILED
JUL 6 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

JOINT APPENDIX

ANTHONY V. LOMBARDINO
Attorney for Plaintiff-Appellant
125-10 Queen Boulevard
Kew Gardens, New York 11415
(212) 275-0200

W. BERNARD RICHLAND
Corporation Counsel for the
City of New York
Attorney for Defendant-Appellee
Jeremiah T. Walsh
Municipal Building
New York, New York 10007
(212) 566-2842

PAGINATION AS IN ORIGINAL COPY

INDEX

	PAGE
DOCKET ENTRIES	1-2
SUMMONS	3
COMPLAINT	4-8
PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER	9-10
AFFIDAVIT OF LEE ROGERS IN SUPPORT OF MOTION, ETC	11-15
AFFIDAVIT OF ANTHONY V. LOMBARDINO, IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION	16-19
VIOLATION ORDER	20
NOTICE OF CROSS MOTION OF DEFENDANTS WALSH AND O'DWYER TO DISMISS COMPLAINT	21-22
AFFIDAVIT OF JOHN W. RUSSELL IN SUPPORT OF CROSS MOTION TO DISMISS COMPLAINT	23-26
AFFIDAVIT OF VICTOR MARRERO IN SUPPORT OF CROSS MOTION TO DISMISS COMPLAINT	27-30
EXHIBIT A: AMMENDED TO AFFIDAVIT OF VICTOR MARRERO,(CITY PLANNING COMMISSIONS REPORT TO BOARD OF ESTIMATE)	31-48
AFFIDAVIT OF EDWARD TRICOMI IN SUPPORT OF CROSS MOTION TO DISMISS COMPLAINT	49-51
EXHIBIT A: ANNEXED TO AFFIDAVIT OF EDWARD TRICOMI, (VIOLATION ORDER)	52-53
NOTICE OF MOTION PRO SE FOR HUGH CAREY AS GOVERNOR OF THE STATE OF NEW YORK	54
AFFIDAVIT OF LEE ROGERS IN OPPOSITION TO DEFENDANT JEREMIAH T. WALSH TO DISMISS COMPLAINT,ETC.	55-58
ORDER AND JUDGMENT APPEALED FROM	59-60

	YR.	NUMBER	MO.	DAY	YEAR					23	$	OTHER	NUMBER	DEM.	YR.	NUMBER
208-1	77	1326	3	18	77	3	440	1				Declatory Judgement	0834		77	1326

PLAINTIFFS

REGAL HEALTH SPA, INC.

DEFENDANTS Judge MacMahon

T.J. 6-12-77 WALSH, JEREMIAH T. As COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF BUILDI

dism 3-28-77 ~~O'DWYER, PAUL, AS PRESIDENT OF THE NEW YORK CITY COUNCIL,~~

dism 3-28-77 ~~HONORABLE LOUIS J. LEFKOWITZ, AS ATTORN GENERAL OF THE STATE OF NEW YORK, AND~~

dism 3-28-77 ~~HONORABLE HUGH CAREY, AS GOVERNOR OF TH STATE OF NEW YORK~~

4/21

CAUSE JT

Violation of the Equal Protection & Due Process Guarantees of the 14th Amendement.

ATTORNEYS

Anthony V. Lombardino
125-10 Queens Blvd
Kew Gardens, New York 11415
Suite 311 275-0200

CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CARDS	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
	MAR 18 1977	84576		JS-5 X	

DATE	NR.	PROCEEDINGS
3-18-77	1.	Filed Complt. & Iss.Summs.
3-18-77	2.	Filed O.S.C. for prel. inj. Ret: 3-15-77 at 2:15 rm X 105...MacMahon, J.
3-23-77	3.	Filed Pltff's Memo of Law in support of its Motion to Stay enforcemen of Zoning Resolution 81-201 etc.
3-24-77	4.	Filed Deft's Notice of cross-motion for an order dismissing the com pursuant to rule 12(b). Ret: 3-25-77 at 2:15 Rm 905.
3-24-77	5.	Filed Deft;s Memo of Law in opposition to the pltff's motion for a prel. inj. & in support of the municipal defts' cross motion to dismis the complt.
3-24-77	6.	Filed Deft's Notice of Motion for dismiss for failure to state a claim upon which relief can begranted. Ret: 3-25-77 at 2:15.
3-24-77	7.	Filed dedt's Memo of law in support of deft' motion to dismiss.
3-28-77	8.	Filed Memo End on Notice of Motion dtd 3-24-77.- Motion to dismiss asto deft's Lefkowitz and Carey granted on consent. So Ordered... MacMahon, J. M/N/
3-28-77	9/	Filed Memo End. on Notice of Motion dtd: 3-24-77.-Complaint dismissed as to deft. O'Dwyer, on consent of pltff. So Ordered...MacMahon, J. M/
4-4-77	10.	Filed Pltff's Affdvt in opposition to the motion of deft,J.T.Walsh, to dismiss the complt.
4-4-77	11.	Filed Pltff's Memo of Law in opposition to the cross-motion of deft. to dismiss the complt,.
4-5-77	12.	Filed Municipal Deft's reply Memo of Law.
4-12-77	13	Fld Order &Judgmant...Ordered that this action be dismissed for failu to state a claim uponwwhich relief can be granted, w/o costs or disbursements...MacMahon,J. mn...Judgmnt Ent 4-13-77...Clerk....
04-21-77	14	Filed Pltff's Memorandum of Law.
04-21-77	15	Filed Memo End. on show cause order filed 3-18-77— See Order & Judgt. filed 4-12-77 dismissing this action for failure to state a claim upon which relief can be granted, without costs or disbursements.-- MacMahon, J. (m/n).
4-21-77	16	Filed Pltff's Notice of Appeal to the USCA from the order & Judgt. entered on 4/13/77, dismissing the complaint. (Mailed Copy to Corp. Counsel, NYC.)

A 3

SUMMONS IN A CIVIL ACTION (CIV. 1a (2-54) (Formerly D.C. Form No.45a Rev. (6-49))

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. ———

REGAL HEALTH SPA, INC.,

Plaintiff

v.

JEREMIAH T. WALSH, As Commissioner of the New York City Department of Buildings, PAUL O'DWYER, As President of the New York City Council, HONORABLE LOUIS J. LEFKOWITZ, As Attorney General for the State of New York, and HONORABLE HUGH CAREY, As Governor of the State of New York.

Defendant

SUMMONS

To the above named Defendants :

You are hereby summoned and required to serve upon

ANTHONY V. LOMBARDINO

plaintiff's attorney , whose address

125-10 QUEENS BOULEVARD
KEW GARDENS, NEW YORK 11415
SUITE 311

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Clerk of Court.

Deputy Clerk.

Date: March 17,1977

[Seal of Court]

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

RECAL HEALTH SPA, INC.,

Plaintiff

- against -

COMPLAINT

JEREMIAH T. WALSH, AS COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF BUILDINGS, PAUL O'DWYER," AS PRESIDENT OF THE NEW YORK CITY COUNCIL, HONORABLE LOUIS J. LEFKOWITZ, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, AND HONORABLE HUGH CAREY, AS GOVERNOR OF THE STATE OF NEW YORK,

Defendants.

----------X

PLAINTIFF, BY ITS ATTORNEY, ANTHONY V. LOMBARDINO, AS AND FOR ITS COMPLAINT, ALLEGES AS FOLLOWS:

FIRST: That jurisdiction of this Court is invoked, pursuant to 42 U.S.C. 1983 and 28 U.S.C. 1331 and 1343.

SECOND: That at all times hereinafter mentioned, Plaintiff was and still is a Corporation existing under and by virtue of the laws of the State of New York and being and doing business within the Southern District of New York.

THIRD: That at all times hereinafter mentioned, the premises at 133 West 45th Street, New York City were used and employed for a Health Club with a valid Certificate of Occupancy to the passage of the zoning resolution by the City Council of the City of New York as more fully hereinafter set forth.

FOURTH: That on or about the 15th day of January,1976, for good and valuable consideration and a large cash investment, Plaintiff did purchase the Leasehold interest hereinbefore set forth and did proceed to make large cash investments for the improvement of the premises and did lawfully and properly operate a Health Club thereon.

FIFTH: That on or about the 8th day of January,1976, the City Council of the City of New York promulgated zoning resolution 81-021 which reads as follows:

> When permitted by the underlying district regulations physical culture or health establishments, however described or advertized, including without limitation reducing salons, massage establishments or steam baths, are restricted to locations in transient hotels with 200 rooms or more provided that no such use and no accessory business sign fronts upon any street or public way and community facilities or buildings predominantly occupied by a community facility. Where such physical

culture or health establishments contain any of the following regulations size sport facilities: basketball courts, handball courts, squash courts, tennis courts or a swimming pool of a minimium 1500 square feet and location restrictions shall not apply. Where a use is rendered nonconforming by such locational restrictions and where such use does not occupy at least 4500 square feet on one floor as of October 1,1975, such use shall terminate not later than one year after the effective date of such restriction and thereafter the space formerly occupied by such use shall be used for only a conforming use.

SIXTH: That said zoning resolution is unconstitutional in violation of the Equal Proctection and Due Process Guarantees of the Fourteenth (14th) Amendment and therefore violates 42 U.S.C. 1983 in that it authorizes Health Clubs with basketball courts, handball courts, squash courts, tennis courts or a swimming pool of a minimium of 1500 square feet to be located, without restriction, while Health Clubs without such facilities are unreasonably restricted to location in transient hotels with 200 rooms or more and other restrictions, and that there is no reasonable basis for such invidious classification between the two (2) groups.

SEVENTH: That said Resolution 81-021 is confiscatory in that its impossible for Plaintiff to comply with its physical requirements on the premises now occupied and therefore it operates to confiscate the business of Plaintiff without compensation in clear violation of the 14th Amendment.

EIGHTH: That Zoning Resolution 81-021 is unreasonable in that its terms allow for a nonconforming use of said premises for only one (1) year, thereby confiscating the property and investment of Plaintiff.

NINTH: That on orabout the 9th day of March,1977, Defendant, JEREMIAH T. WALSH, As Commissioner of the New York City Department of Buildings acting under color of the Statutes, Regulations,Customs and Usages of the Stateof New York did serve a Notice of Violation of Zoning Resolution 81-021 and has threatened to bring on a proceeding to put Plaintiff out of business in Violation of 42 U.S.C. 1983.

TENTH: That Plaintiff will suffer irreputable injury unless execution of said Zoning Resolution be enjoined and Judgment be rendered declaring it unconstitutional.

ELEVENTH: That Plaintiff has no adequate remedy at law.

WHEREFORE, Plaintiff prays that Judgment be made and entered declaring Zoning Resolution 81-021 promulgated by the New York City Council on January 8,1976 unconstitutional and that

Defendants, their agents and employees be enjoined and stayed from enforcing said Zoning Resolution and for such other and further relief as to this Court may be deemd just and proper.

Dated: Kew Gardens, New York
March 17th, 1977.

ANTHONY V. LOMBARDINO
ATTORNEY FOR PLAINTIFF
OFFICE & P.O. ADDRESS
125-10 QUEENS BOULEVARD
KEW GARDENS, NEW YORK 11415
SUITE 311
275-0200

Anthony V. Lombardino

ANTHONY V. LOMBARDINO

PRELIMINARY INJUNCTION AND
TEMPORARY RESTRAINING ORDER

PAGE 9-10

A 9

JUDGE MACMAHON

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 C10 1326

REGAL HEALTH SPA, INC.,

Plaintiff

- against -

JEREMIAH T. WALSH, AS COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF BUILDINGS, PAUL O'DWYER AS PRESIDENT OF THE NEW YORK CITY COUNCIL, HONORABLE LOUIS J. LEFKOWITZ, AS ATTORNEY GENERAL FOR THE STATE OF NEW YORK, AND HONORABLE HUGH CAREY, AS GOVERNOR OF THE STATE OF NEW YORK,

Defendants.

ORDER TO SHOW CAUSE FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

UPON READING AND FILING the affidavit of LEE ROGERS, Sworn to the 16th day of March, 1977, the Affidavit of ANTHONY V. LOMBARDINO, AND ROBERT SOSNOWICK, BOTH sworn to the 17th day of March, 1977, the Summons and Complaint, the Notice of Violation of Zoning Resolution 81-021 and all the proceedings heretofore had,

NOW, ON MOTION OF ANTHONY V. LOMBARDINO, ATTORNEY FOR PLAINTIFF, IT IS HEREBY ORDERED, THAT THE Defendants Show Cause at a Term of Motions to beheld before the United States District Court Judge LLOYD F. MACMAHON in Room 905 of the United States Court House, on the 25th day of March, 1977, at 2:15 o'clock in the forenoon or as soon

thereafter as counsel can be heard for an Order, pursuant to Rule 65 of the Federal Rules of Civil Procedure why an Order should not be made and entered ~~Temporarily~~ PRELIMINARY enjoining enforcement by Defendants of Zoning Resolution 81-021 promulgated by the New York City Council on January 8,1976 pending a disposition of this action on condition that Plaintiff post a bond in a sum fixed by the Court and for such other and further relief as to this Court may be deemed just and proper.

~~IN THE MEANTIME, and until the disposition of this Motion be made, Defendants be and they are hereby stayed from enforcing Zoning Resolution 81-021 promulgated January 8,1976 by the New York City Council on posting a bond in the sum of $_____~~

~~SUFFICIENT cause appearing therefore, let personal service of copies of this Order to Show Cause and supporting papers upon Defendants by PAUL RUBENFELD, ESQ., on or before the ___day of March,1977, be deemed sufficient.~~

DATED New York, N.Y.
MARCH 18, 1977

/s/ LLOYD F. MACMAHON
UNITED STATES DISTRICT COURT JUDGE.

ISSUED AT
1 P.M
3-18-77

AFFIDAVIT OF LEE ROGERS IN SUPPORT
OF MOTION, ETC.

PAGE 11-15

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

REGAL HEALTH SPA, INC.,

Plaintiff

- against -

JEREMIAH T. WALSH, AS COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF BUILDINGS, PAUL O'DWYER AS PRESIDENT OF THE NEW YORK CITY COUNCIL, HONORABLE LOUIS J. LEFKOWITZ, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK AND HONORABLE HUGH CAREY, AS GOVERNOR OF THE STATE OF NEW YORK,

Defendants.

----------X

STATE OF NEW YORK :
SS.:
COUNTY OF QUEENS :

LEE ROGERS, BEING DULY SWORN, DEPOSES AND SAYS:

That I am the President of the Regal Health Spa,Inc., a Health Club located at 133 West 45th Street, New York City, New York.

The Club is a Gymnasium for body toning and supervised exercise, it is equipped with a suana and steam room and other equipment used for exercise.

The predecesor Corporation was 21 Her Place Spa,Inc., that held a three (3) year Lease on the premises commencing August 28,1974.

On the 15th day of January,1976, 21 Her Place Spa, Inc., assigned the Lease to Regal Health Spa,Inc., for a purchase price of $15,000.00, since then thousands of dollars have been invested in the premises for alterations and furniture and equipment.

It is a going business and as hereinbefore set forth,large sums of money have been invested therein.

On the 8th day of January,1976, the New York City Council promulgated Zoning Resolution 81-021 which reads as follows:

> When permitted by the underlying district regulations physical culture or health establishments,however described or advertised,including without limitation,reducing salons, massage establishments or steam baths, are restricted to locations in transient hotels with 200 rooms or more provided that no such use and no accessory business sign fronts upon any street or public way and community facilities or buildings predominantly occupied by a community facility. Where such physical culture or health establishments contain any of the following regulations size sport facilities: basketball courts, handball courts, squash courts, tennis courts or a swimming pool of a minimum 1500 square feet and location restrictions shall not apply. Where a use is rendered nonconforming by such locational restrictions and where such use does not occupy at least 4500 square feet on one floor as of October1,1975, such use shall terminate not later than one year after the effective date of such restriction and thereafter the space formerly occupied by such use shall be used only for a conforming use.

By the terms of the Resolution, Plaintiff's occupancy of the premises has now become illegal. It is strongly urged that said resolution violates both the Equal Protection of the Law and Due Process of the Law as guaranteed by the Fourteenth (14th) Amendment.

There is no adequate State grounds for the differentiation in treatment for Zoning of Health Clubs depending upon whether they are equipped in the manner set forth in the Ordinance.

It would be impossible for Plaintiff to comply with the New Zoning Regulation by requiring the installation of the equipment therein and therefore the resolution amounts to confiscation.

I have been served with a Notice of Violation to discontinue all non-conforming uses, a copy of which is attached.

When the zoning resolution was passed, its terms provided for a non-conforming use for only one (1) year. In order to remain in business, the Corporation would have to move its operation to a transient hotel with 200 rooms or more and with additional restrictions. Otherewise, the Corporation would have to discontinue its business with a resulting loss in capital

investment as well as income. I am dependent upon this business for my livlihood.

The effort on the part of the zoning resolution to classify health clubs for zoning purposes is arbitrary, capricious and confiscatory. Surely if the State or any of its municipality sort to condemn my property, the Constitution requires that the Corporation would be adequately compensated. The Zoning Resolution is tantamount to confiscation without compensation and a flagrant denial of both Due Process and Equal Protection of the Law.

As a result, I have as Plaintiff commenced an action against Defendants for Violation of 42 USC 1983, and for the Declaration of the Unconstitutionality of Zoning Resolution 81-02L, however, if during the pendency of this action the zoning resolution should be enforced and the business closed, Plaintiff will suffer irreputable damage for which it will have no adequate remedy at law. By balancing the equities, Defendants will suffer little or no prejudice should the enforcement of the zoning resolution be stayed pending its action. Under the circumstances, Plaintiff respectfully moves for a Temporary Injunction and a Restraining Order pending the determination of this action.

Alth ugh it is diffecult to see how Defendants can be prejudiced in this matter should a stay be granted, Plaintiff is willing to post a bond pursuant to Federal Rules of Civil Procedure.

That no prior application has been made to any Court or Judge for this relief.

WHEREFORE, Plaintiff prays that an Order be made and entered granting Plaintiff a Temporary Injunction staying Defendants from enforcing Zoning Resolution 81-021 pending determination of this action and for a Temporary Restraining Order pending decision on this Motion and for such other and further relief as to this Court may be deemed just and proper.

Lee Rogers
LEE ROGERS

Sworn to before me this
16th day of March, 1977.

Notary Public

77

AFFIDAVIT OF ANTHONY V. LOMBARDINO,
IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION,

PAGE 16-19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

REGAL HEALTH SPA, INC.,

Plaintiff

- against -

AFFIDAVIT

JEREMIAH T. WALSH, AS COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF BUILDINGS, PAUL O'DWYER, AS PRESIDENT OF THE NEW YORK CITY COUNCIL, HONORABLE LOUIS J. LEFKOWITZ, AS ATTORNEY GENERAL FOR THE STATE OF NEW YORK, AND HONORABLE HUGH CAREY, AS GOVERNOR OF THE STATE OF NEWYORK,

Defendants.

----------X

STATE OF NEW YORK :
SS.:
COUNTY OF QUEENS :

ANTHONY V. LOMBARDINO, BEING DULY SWORN, DEPOSES AND SAYS:

That he is the Attorney for the Plaintiff in the above entitled action.

This action is brought, pursuant to 42 U.S.C. 1983 to declare Zoning Resolution 81-021 promulgated by the New York City Council on January 8,1976 to be unconstitutional and to enjoin Defendants, and their agents from enforcement thereof.

The text of the Statute is set forth in the annexed Complaint and Affidavit of Lee Rogers, President of the Plaintiff Corporation.

The Status, on its face, is clearly confiscatory and violation of Both Equal Protection and Due Process of Law as secured by the Fourteenth (14th) Amendment and therefore violates 42 U.S.C. 1983.

It purports to allow a Health Club having certain size basketball courts, handball courts, squash courts, tennis courts or swimming pools unrestricted zoning privileges while it sharply limits those without such facilities to transient hotels with 200 rooms or more with other restrictions.

In effect, Health Clubs that serve a very important function to the community are thereby effectively put out of business. This Ordinance, if uniformly enforced, would put out of business well known Health Clubs such as Elaine Powers and less well known Health Clubs such as that owned by Plaintiff.

Plaintiff's investment of $15,000.00 for the purchase thereof and considerable thousands of dollars for improvements' would thus be wiped away and confiscated by enforcement of this resolution.

On or about the 9th day of March,1977, Plaintiff was served with a Notice of Violation of 81-021 which is the condition precedent to a proceeding to close down the premises.

It is difficult to conceive how this zoning resolution can survive constitutional challenge, nevertheless, unless a Temporary Injunction and Temporary Restraining Order be granted, Plaintiff will suffer irreputable damage pending resolution of this law suit and a favorable result may thus be academic.

If Plaintiff be closed down, Plaintiff will have no adequate remedy at law. On the other hand, Defendants will not be prejudiced by the Temporary Injunction and Temporary Restraining Order, moreover, Plaintiff is willing to post a bond to assure that no prejudice will result.

It is respectfully submitted that the bond should not exceed $500.00 in view of the unliklihood of damages to Defendants.

Up until the promulgation of zoning resolution81-021, Plaintiff had a valid Certificate of Occupancy and lawfully occupied the premises performing the services to the public.

PAUL RUBENFELD, ESQ.

Your deponent respectfully requests that Mr/be granted permission to personally serve the State and City Officials herein with these Papers including the Order to Show Cause, Supporting Papers and Summons and Complaint instead of the Marshall in order to avoid delay in this matter.

That no prior application has been made to this Court for this relief.

WHEREFORE, Plaintiff prays for an Order for a Temporary Injunction and Temporary Restraining Order staying enforcement of Zoning Resolution 81-021 pending determination of this action and for such other and further relief as to this Court may be deemed just and proper.

ANTHONY V. LOMBARDINO

Sworn to before me this
17th day of March, 1977.

NOTARY PUBLIC

A 20

THE CITY OF NEW YORK
HOUSING AND DEVELOPMENT ADMINISTRATION
DEPARTMENT OF BUILDINGS

MANHATTAN
Municipal Building
New York, N.Y. 10007
566-2490

BRONX
1932 Arthur Avenue
Bronx, N.Y. 10457
583-5520

BROOKLYN
Municipal Building
Brooklyn, N.Y. 11201
643-8920

QUEENS
120-55 Queens Blvd.
Kew Gardens, N.Y. 11415
520-8450

RICHMOND
Borough Hall
St. George, N.Y. 10301
390-5290

[illegible] and Jilly Freeman (owner) — John M Rachles
[illegible] Lenox Parkway — 120 Riverside Dr. Apt 11H
[illegible] Lenox Spa (lessee) — NYC, NY 10024
[illegible] Tolis, Daniella (Opr in)
[illegible] E. 77th St

Whereas, it has been reported that there exists a violation in the subject premises as described below.

You are hereby directed to remove this violation, pursuant to Section C26-86.5, subd. d and/or Section 643e-8.0 of Title 28 of the Administrative Code.

All inquiries and responses to this violation should be directed to the Violation Section in the respective borough.

(If not corrected within ten days, you may be summoned to appear in the Criminal Court.)

[illegible] Lenis
BOROUGH SUPERINTENDENT

Jeremiah Ronan
COMMISSIONER

[illegible] Wes Clark

[illegible] E. 115th St	2	11	Boro: Man
No. of Stories: 4	Block: 748	Lot: 116	

Violation Number

Date	Type	Dist.	No.	Quad
3/21/72	C	M1 5	2	PL

Complaint No.

Docket No.

Nature of Violation: [illegible] Physical Culture Establishment
[illegible] 81-15 and 81-021 of the Zoning Resolution

Prior to the effective date of this amendment, the maintenance of a physical culture establishment rendered non-conforming by additional, functional, and size restrictions adopted may be continued, including such non-conforming use for more than one year after the effective date of such restriction.

[illegible] all non-conforming uses forthwith.

Filed By: [illegible]

BRIBERY IS A CRIME:

A person who gives or offers a bribe to any employee of the City of New York, or an employee who solicits or accepts a bribe, is guilty of a felony punishable by imprisonment for up to [illegible]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

REGAL HEALTH SPA, INC.,

Plaintiff,

-against- : NOTICE OF CROSS-MOTION

JEREMIAH T. WALSH, as Commissioner of the New York City Department of Buildings; PAUL O'DWYER, as President of the New York City Council; HONORABLE LOUIS J. LEFKOWITZ, as Attorney General for the State of New York; and the HONORABLE HUGH CAREY, as Governor of the State of New York, : 77 Civ. 1326 (L. M.)

Defendants.

----------X

S I R S:

PLEASE TAKE NOTICE THAT upon the annexed affidavit of John W. Russell sworn to on March 24, 1977; the affidavit of Victor Marrero sworn to on March 23, 1977; and the affidavit of Edward Tricomi sworn to on March 24, 1977, and the exhibits annexed thereto, the undersigned will move this Court at a Motion Term thereof to be held at the United States District Courthouse, Room 905, Foley Square, New York, New York on the 25th day of March, 1977 at 2:15 in the afternoon of that day or

as soon thereafter as counsel can be heard for an order dismissing the complaint herein pursuant to Rule 12(b) of the Federal Rules of Civil Procedure upon the ground that the complaint fails to state a claim upon which relief may be granted.

Dated: March 24th, 1977

New York, New York

Yours, etc.,

W. BERNARD RICHLAND
Corporation Counsel
Attorney for the Defendants
WALSH and O'DWYER
Office and P.O. Address:
The Municipal Building
New York, New York 10007
Tel.: 212-566-2842

by: John W. Russell
JOHN W. RUSSELL

TO: ANTHONY V. LOMBARDINO, Esq.
Attorney for Plaintiff
Office and P.O. Address:
125-10 Queens Boulevard
Kew Gardens, New York 11415
Tel.:212-275-0200

Hon. LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Defendants
LEFKOWITZ and CAREY
Office and P.O. Address:
Two World Trade Center
New York, New York 10047
Tel.:212-488-3385
Attn.: Jack Schachner, Esq.

AFFIDAVIT OF JOHN W. RUSSELL IN SUPPORT
OF CROSS MOTION TO DISMISS COMPLAINT

PAGE 23-26

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

REGAL HEALTH SPA, INC.,

Plaintiff,

-against-

JEREMIAH T. WALSH, et al.,

Defendants.

----------X

AFFIDAVIT

77 Civ. 1326

(L. M.)

STATE OF NEW YORK]
] ss.:
COUNTY OF NEW YORK]

JOHN W. RUSSELL, being duly sworn, deposes and says:

1. I am of Counsel to W. Bernard Richland, Corporation Counsel of the City of New York, the attorney of record for the defendants, WALSH and O'DWYER ("municipal defendants"). I submit the affidavit in opposition to the plaintiff's motion for a preliminary injunction and in support of the municipal defendants' cross-motion to dismiss.

2. On January 8, 1976 the New York Board of Estimate enacted into law several amendments to the Zoning Resolution of the City of New York promulgated by the City Planning Commission and designed to deal with the proliferation of physical culture establishments in the City of New York and in the Special Clinton and Special Theater Districts in particular.

2. Section 32-18 of the Zoning Resolution of the City of New York placed a one-year moratorium on the establishment of new physical culture uses throughout the City of New York. That one-year moratorium provision has been extended through April 15, 1977 at which time it is anticipated that a comprehensive adult use zoning plan will have been enacted by the Board of Estimate.

3. Section 81-021 of the Zoning Resolution of the City of New York, the provision challenged herein by the plaintiff, provides for the amortization of all existing physical culture uses within the Special Theater District within one year from its enactment unless the use conforms to certain locational requirements set forth therein.

4. Section 96-524 of the Zoning Resolution of the City of New York provides a comparable amortization requirement for physical culture uses in the Special Clinton District.

5. A more complete statement of the legislative history, aims and provisions of those January 8, 1976 amendments is contained in the accompanying affidavit of Victor Marrero, Chairman of the New York City Planning Commission.

6. Section 81-021 of the Zoning Resolution of the City of New York constitutes a patently reasonable and valid exercise of the police power. The amendment was proposed after much study and the locational requirements prescribed are designed

to insure maximum physical culture and recreational facilities for the community within the stated goals of the legislation.

7. Amortization of non-conforming uses is essential to the implementation of a comprehensive zoning plan and the principle has been expressly recognized by the courts of the State of New York.

8. The plaintiff has made no allegations that the law is being enforced in a discriminatory or improper manner.

9. The plaintiff has failed to set forth a claim upon which relief can be granted and the complaint should be dismissed.

10. The complaint should be dismissed upon the further ground that the plaintiff has failed to raise a substantial federal question.

11. Alternatively, this court should decline to exercise jurisdiction or abstain upon the grounds that issues of state law exist which, upon resolution by the state courts, may obviate the need for the federal court to determine any federal constitutional issues; that the federal courts should not interfere in state efforts to establish a coherent policy with respect to matters of substantial local public concern; and that the federal courts should not act to enjoin or interfere with pending state criminal actions absent special circumstances or harassment and irreparable harm both great and immediate.

12. The plaintiff has clearly failed to sustain the heavy burden placed upon a litigant seeking preliminary injunctive

relief. The plaintiff has demonstrated no probability of success upon the merits and has alleged no facts to establish that irreparable harm will occur in the absence of such drastic relief. In fact, since the plaintiff admits it acquired its interest in the leasehold and business one week subsequent to the effective date of Section 81-021, any injury claimed must be deemed self-inflicted.

13. Finally, the complaint should be dismissed against the defendant PAUL O'DWYER, AS PRESIDENT OF THE NEW YORK CITY COUNCIL since the City Counsil had no part in the promulgation or enactment of the challenged statute.

WHEREFORE, I request that the plaintiff's motion for a preliminary injunction be denied in all respects and that the municipal defendants' motion to dismiss be granted in all respects.

JOHN W. RUSSELL

Sworn to before me this
24th day of March, 1977.

Norma Alexis

NORMA ALEXIS
Notary Public, State of New York
No. 41-4622478
Qualified in Queens County
Commission Expires March 30, 1977

AFFIDAVIT OF VICTOR MARRERO IN SUPPORT
OF CROSS MOTION TO DISMISS COMPLAINT

PAGE 27-30

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

REGAL HEALTH SPA, INC.,

Plaintiff

- against -

JEREMIAH T. WALSH, AS COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF BUILDINGS, PAUL O'DWYER, AS PRESIDENT OF THE NEW YORK CITY COUNCIL, HONORABLE LOUIS J. LEFKOWITZ, AS ATTORNEY GENERAL FOR THE STATE OF NEW YORK, AND HONORABLE HUGH CAREY, AS GOVERNOR OF THE STATE OF NEW YORK,

Defendants.

----------X

STATE OF NEW YORK :
SS.:
COUNTY OF NEW YORK :

VICTOR MARRERO, BEING DULY SWORN, DEPOSES AND SAYS:

I am the Chairman of the New York City Planning Commission, having been appointed to this office by Mayor Abraham D. Beame on December 31, 1975.

Upon taking office, I became familiar with a great many matters that had been enacted by the City Planning Commission prior to my appointment but which were still pending before the Board of Estimate of the City of New York for final action, among which was an amendment to the Zoning Resolution of the City of New York (CP-23116), which pertains to this litigation. This matter had been the subject of an extensive hearing before the City Planning Commission on November 19, 1975.

To acquaint myself with this matter, I consulted with my fellow Commissioners and the staff of the Department of City Planning and reviewed the hearing record and the material contained in the office files on CP-23116, including staff reports, the statements pro and con from the general public, and the City Planning Commission's report to the Board of Estimate (atteched as Exhibit A).

After familiarizing myself with this material, it was apparent to me that the City Planning Commission in its deliberations prior to approving the locational and amortization restrictions for physical culture establishments in the Special Clinton and the Special Theatre Districts (CP-23116) reviewed the rapid proliferation of such uses, the adverse impact adding up to nuisance caused by such proliferation, the availability of appropriate locations for such uses within the districts and the appropriateness of the zoning ordinance as a means of dealing with the nuisance created by such uses.

In 1961, when the comprehensive amendment to the Zoning Resolution was adopted by New York City, physical culture uses were principally located as a part of the athletic and recreational facilities of hotels and community facility buildings. These locations, buffered from the street, provoked no controversy and were compatible with the surrounding neighborhood. In the 14 years between the adoption of the comprehensive amendment of the Zoning Resolution in 1961 and the adoption of the amendment restricting the locations of physical culture uses within the two Special Districts the number of these uses increased by over 200 percent, from 16 in 1961 to 49 by 1975. Not only have these uses proliferated in number but the very nature of such uses has changed.

Many of these newly-proliferated uses occupy storefronts and are characterized by aggressive hawking at subway station access points and on pedestrian thoroughfares, to the annoyance of residents and the many users of the Central Business District. In the area where concentration is greatest - West Midtown -- the effects have been magnified. These uses have become a nuisance to other business uses which had previously located in the area pursuant to local zoning regulations.

Illustrations of the trends brought about by the concentration of such uses were furnished at the City Planning Commission's public hearings. Testimony was offered to show that various businesses were unable to obtain qualified employees to work in the area. The Royal Manhattan Hotel located on Eighth Avenue between 44th and 45th Streets was cited as unable to attract guests. Both instances of economic hardship were attributed to locations proximite to the concentration of uses which the ordinance herein challenged would restrict. Further evidence is found in the difficulty in renting experienced by major land uses in the area including the Uris Building at 50th Street and Broadway, the original McGraw Hill Building at 42nd Street between Eighth and Ninth Avenues, and the Manhattan Plaza housing development at 42nd and 43rd Streets between Ninth and Tenth Avenues. The latter development proved economically infeasible at market rents, largely because of the adverse environmental impact created by the proliferation and concentration of physical culture uses in the surrounding area.

Paralleling the distressed character of existing major land uses is the lack of any new major investment in the area since 1965 -- the date when the proliferation of physical culture begun. In the areas where concentrations of such uses currently exist there has been a demonstrable trend towards business and job loss, evidenced by a drop in sales income, the relocation of many firms

and businesses from the area and a decline in both property and sales tax receipts.

This amendment does not eliminate physical culture uses entirely from these two special districts but rather restricts them to their more traditional locations in hotels and community facility buildings. Within the area there are 30 hotels in which such uses are permitted to locate as well as several community facility buildings. The restrictions also permit the establishment of new physical culture uses which contain regulation size basketball, handball, squash or tennis courts, or swimming pools of a minimum 1500 square feet. Further, even without these sports facilities physical culture establishments are permitted to remain where the use occupied more than 4,500 square feet on one floor.

These restrictions are in keeping with the intention that such uses are part of or accessory to major athletic or recreational facilities, especially in the area of West Midtown, the City's major recreational and entertainment district. The requirement of regulation sports facilities or minimum size establishments are reasonable regulations designed to promote beneficial land uses which are either large enough or offer activities which will serve the community and be in keeping with the entertainment and recreation character of the area.

Victor Marrero, Chairman

SWORN TO BEFORE ME

THIS 23rd DAY OF MARCH

1977.

DAVID GREENBERG
Notary Public, State of New York
No. 24-1550030
Qualified in Kings County
Term Expires March 30, 1977

EXHIBIT A: AMMENDED TO AFFIDAVIT OF VICTOR MARRERO
(CITY PLANNING COMMISSIONS REPORT TO BOARD OF ESTIMATE)

PAGE 31-48

Amendment(s) of the Zoning Resolution pursuant to Section 200 of the New York City Charter relating to various Section(s) concerning limitations on Use Group 9, Physical Culture or Health Establishments

These amendments would limit the location of Physical Culture or Health Establishment within the Special Clinton District and the Special Theatre District to a) locations in hotels of more than 200 rooms or community facility buildings, or b) locations where the proposed use includes enumerated sports facilities of regulation size. Establishments which do not meet these locational or facility requirements or which do not occupy at least 4500 square feet on a single floor will be amortized and terminated no later than one year following the effective date of these amendments. The amendments further provide for a City-wide moratorium on the establishment of physical culture or health establishments for one year following their effective date in order to prepare appropriate city-wide controls. However, gymnasiums used exclusively for basketball, handball, squash or tennis are exempt from the moratorium.

On October 20, 1975 (Cal. #2) the Commission scheduled a PUBLIC HEARING on the proposed amendments. The public hearing was held on November 19, 1975 (Cal. #16).

Numerous speakers appeared in favor of the proposed amendments including a Councilman; the representative of an assemblyman; the Chairman of Community Board #4; the Chairman of Community Board #6; the Chairman of the Clinton Planning Council; the Chairman of the Midtown North Community Council; the President of the Broadway Association; the Executive Director of the Association for a Better New York; the President of the Real Estate Board of New York; the Chairman of the Clinton Steering Committee; the Pastor of a Clinton Community Church; the owners of several restaurants in the Theatre District; the President of a Real Estate Corporation and representatives of the Fifth Avenue Association; the League of New York Producers; the League of New York Theatres; the Fashion Capital of the World; the Volunteers to Improve Third and Lexington Avenues; an advertising agency; Group Health Incorporated; the Franklin Savings Bank; the West Side Association of Commerce; the Holy Cross School; the Businessmen's Association of Ninth Avenue; the East Side Association the West 46th Street Association (Restaurant Row); the Association of East Side Communities; the Theatre District Business Association; the New York Chapter of the Knights of Columbus; Council #430 of the Knights of Columbus; and

several residents of the Clinton Community. In addition the Commission has received communications supporting the proposed amendments from: an Assemblyman, a Congressman; the Chairman of the Ninth Avenue Association of New York, Inc Incorporated; the Chairman of Community Board #5; the Chairman of Community Board #2: the Executive Secretary of the Avenue of Americas Association, Incorporated; the Executive Vice President of the Motel Association of New York, Incorporated; the former manager of the Royal Manhattan Hotel; Manhattan Plaza Associates; the Murray Hill Committee and many residents, restaurateurs and small businessmen of the Theatre and Clinton District communities. Many of the speakers in favor of the amendment spoke of the incompatibility of physical culture establishments with the theatres and supporting restaurants. They told of a loss of business caused by the atmosphere and quality of the area. A representative of a large advertising agency and the representative of Group Health Incorporated spoke of the difficulty in attracting employees to work in the area. The former manager of the Royal Manhattan Hotel attributed the hotels difficulties and eventual closing to the deterioration of Eighth Avenue which was brought about by the great increase in physical culture establishments. Several businessman in their communications to the Commission have indicated that they were formerly located in either the Theatre or Clinton District but that when a physical culture establishment moved into an adjacent store their business was adversely affected to such an extent that they were forced to relocate. Residents of Clinton testified that conditions adjacent to physical culture establishments presented situations incompatible with residential living and the rearing of children. The presence of numerous schools in the area was pointed out. Owners of real estate told of the difficulty in attracting or keeping tenants when a physical culture use occupied premises in the same or an adjacent building.

Only two speakers were directly opposed to the amendment. One was a state licensed masseur not practicing in the Theatre or Clinton District and the other was a representative of the New York State Licensed Medical Masseurs and Masseuses.

Other speakers including representatives of the Clinton Housing Forum, Local 306 Motion Picture Operators Union, and the Midtown South Community Council expressed reservations as to the future effectiveness of the regulations. Some expressed the idea that the regulations were just a "first step" and did not go far enough The hearing was closed.

Consideration

There has been an increase of over 200% in the number of physical culture establishments in the Theatre District and adjacent parts of the Clinton Special Districts since the adoption of the current zoning resolution. This use group sub-category exploded from 16 to 49 between 1961 and 1975.

Under present zoning law, it is permissible to develop provisions to restrict and abate the proliferation of an undesirable land use. If a land use is so incompatible with the predominant uses of a district's zoning as to change the character of the area it is appropriate to remove that use. The continued comparative freedom of locational choice for what has come to be regarded as an obnoxious use of land does not advance the general welfare. The thrust of the prohibition would fall upon all enterprises of this class. Such use of the zoning police power is permissible if it is commensurate with the dangers posed to the amenity, health, and welfare of the community as a whole.

The proposed zoning restrictions are not a total proscription. Physical culture facilities are permitted to locate in hotels of a certain size, community facility buildings, and as accessory uses and major principal uses where there is substantial manifestation of physical culture activity in the form of tennis courts, swimming pools, etc.

Among the land use regulations provided by the framers of the present zoning resolution enacted in 1961 is the separation of various land uses into use groups. To a large extent, the zoning text of the present resolution reflects the effects of previous zoning studies, particularly the report ot October 1950 prepared by Harrison, Ballard and Allen, entitled "Plan for the Rezoning of the City of New York," and the 1958 land use survey of 800,000 parcels within the City by the Works Progress Administration of the Federal government.

In formulating the use groups for the present classifications in the zoning resolution, the earlier surveys were checked in the field. Field conditions brought changes in the text for the various district, zoning control devices, and use groups.

However, the report is careful to note that, "This attention to field conditions does not imply acceptance of existing conditions for it was found that too much reliance placed on the existing pattern of City development would prevent zoning from further improving City living conditions."

In determining use groups, the framers of the 1961 resolution gave greater weight to factors of then-current development, indicated trends and anticipated needs. In certain cases, conditions reported from the field resulted in the development of new devices and, in other cases, new districts to purposefully meet the needs of New York City, each borough and each section within each borough.

The framers of the present ordinance were aware of the need to respond to changing conditions and urged flexible zoning devices permitting change and adaptation to new, unforeseen uses as noted at page 41 of the Harrison, Ballard & Allen report.

After 1961 and particularly within the last few years, numerous physical culture establishments, spas, and massage storefront operations have proliferated in the Midtown area, first locating in the Times Square vicinity and, of late, venturing to other areas of Midtown. In location, number, and impact, the present trend is a departure from the pre-1961 locational pattern whereby such uses were largely confined to athletic or recreation facilities of hotels or community facilities, and cannot reasonably be said to have been foreseen at the drafting of the present use groups controls.

Additionally, the nuisance character of these uses in relation to existing major land uses of certain districts has developed to such a degree that substantial city efforts have been devoted to their alleviation. Numerous newspaper articles, editorials, and comments by residents and businessmen express the danger to the public welfare and morals posed by the indiscriminate proliferation of such uses throughout Midtown.

The recent proliferation of physical culture uses has greatly increased the impact of such uses on Midtown areas. The locational choice of such establishments--a trend to storefront locations--has witnessed a propensity to engage in nuisance activities to attract customers to their locations. While serving a limited clientele, aggressive hawking of such establishments adjacent to the premises is conducted at subway station access points and on pedestrian thoroughfares to the annoyance of residents and the many users of the Central Business District.

It is in the area of maximum and dramatic expansion of physical culture uses that dramatic decreases in values and expectations has occurred. Certain of these effects are magnified in the area of West Midtown. Illustrative of these trends are the recent difficulty of major land uses in the area including the Uris Building at Broadway and 50th-51st Streets, the YMCA at Eighth Avenue at 50th and 51st Streets, the original McGraw-Hill Building at 42nd Street between Eighth and Ninth Avenues, the Hotel Manhattan at Eighth Avenue at 44th and 45th Streets, as well as the controversial Manhattan Plaza housing development at 42nd and 43rd Streets between Ninth and Tenth Avenues.

Paralleling the distressed character of these major land uses been the explosion of physical culture uses. Within a period of 5 or 6 years, the numbers of establishments classified as physical culture increased substantially. Although such uses represent only a small percentage of the land area, the common perception of these uses is out of all proportion to their square footage.

A specific illustration of the detrimental effects of the proliferation of physical culture uses was furnished by The Ted Bates and Company Incorporated, Advertising Agency, located at 1515 Broadway. In testimony before the Commission a representative from that office stated that recruitment of a talented personnel to work in this area has become very difficult and in addition, the rate of turnover has become very high. The agency attributes this phenomena to the conditions created by abundance of physical culture land uses located in the area

The Times Square and Clinton Special Districts have the potential to be economically and socially stable communities as proven by the thriving season the theatre industry is experiencing this year. However, on the blocks in these districts where there is a proliferation of physical culture establishments surveys show a general trend toward business loss and failure. This trend is evidenced by a general drop in money sales in the area, large numbers of firms and businesses relocating to other areas, and noticeable amount of businesses closing, as well as the real estate failures and recruitment difficulties noted above. This appears to be a strong indication of the detrimental influence created by the proliferation of physical culture establishments in the area.

Among the methods available for dealing with the proliferation of massage and physical culture uses beyond the legitimate demand for those services are: Enforcement of criminal statutes regarding prostitution and solicitation; licensing; and zoning provisions sufficient to restrict and abate the proliferation and spread of an undesirable land use.

Prostitution and solicitation are crimes in New York State. The existence of the State's penal law and the present mode of its enforcement have not contributed to a decline in the number or abatement of the spread of massage parlors. If exclusive reliance is placed on dealing with massage parlors solely in the context of the criminal law then an acceptance of the present extent and trends for such land uses is implied.

Licensing has been atempted. The Massage Institute Licensing Law was enacted in April 1973. Since June of that year, enforcement of its provisions has been enjoined by the New York Supreme Court. Additional legislation has been proposed. None has been successful.

Adding to these difficulties is the statutory scheme of the New York State Education Law which seeks not to control the practice of massage but merely the use of appellation, masseus, masseur, and massage.

Although there is room for improvement in the methods and effectiveness of the enforcement of penal statutes as well as improvement in the New York State Licensing Law and such improvement is urged, the municipality may properly direct its attention to the land use consequences of physical culture activities in its present form. That there may be other potential methods of dealing with a problem so as to abate its land use consequences does not foreclose the ability of a municipality to deal directly with the land use problems through the exercise of police power of zoning.

The basic measure for controlling land use by zoning is to establish use-zoning districts. Under traditional practice, each district is theoretically allocated to one predominant use, together with appropriate related uses and other uses needing the same type of environment. There are two methods for regulating uses. One is the development of lists of specific uses which shall be permitted or excluded; the other is the designation of performance standards which shall be met by permitted uses. New York, as well as most other cities, has elected to employ the former method of groupings of uses.

The proposed legislation restricts the location of physical culture uses to hotels and community facilities to facilitate the proper functioning of comprehensive land use planning which established such zones.

The proposed text change restricts the location of physical culture uses to certain hotels and community facilities within the Clinton and Theatre Special Districts. Numerous hotels and community facilities are found within centrally located Midtown. Physical culture uses are presently found in the resolution at Section 32-18, Use Group 9. At present, physical culture uses are permitted within the following zones: C2 local commercial, C4 general commercial, C5 restricted central commercial, C6 general central commercial, and C8 general service, as well as M1, M2 and M3. Within the C4 general commercial and C5 restricted central commercial zoning districts, physical culture uses are locationally restricted to other than the ground floor of a building unless such use is at least 50 feet from the street wall of the

building in which it is located. This restriction also applies to the following uses in Use Group 9: Blueprinting; Business Schools; Catering clothing rental; Medical labs; Musical instrument repair; Printing; Auction rooms; Art studios; Trade Schools; Business machine sales, rental and repair; Umbrella repair; and Banquet hall .

The zoning resolution also restricts the location of other uses within the districts in which they are permitted. Such locational restrictions are found in the following sections: 32-41 Enclosure within Buildings, 32-421 Limitation on floors occupied by non-residential uses, 32-422 Location of floors occupied by non-residential uses, as well as 32-423 Limitation on ground floor location. A provision analogous to the proposed text revision exists in the present resolution with respect to eating and drinking establishments without restrictions on entertainment. Such establishments are restricted to locations in hotels pursuant to Section 32-19, Use Group 10.

The above supplementary controls regulating enclosure of uses within buildings, and restrictions of uses to specified parts of a building are an essential part of the comprehensive plan of land use as expressed in the zoning resolution. The legislative report accompanying the 1961 resolution refers to the importance of these provisions at page 110 in the following manner. "Some of them, particularly those controlling location within buildings, are so widely applicable and of such major importance that they significantly affect the character of the districts".

The locational restriction within the Clinton and Theatre Special Districts limits physical culture establishments to hotels with more than 200 rooms or community facilities provided that neither the use nor any sign advertising it fronts upon a street.

Any physical culture establishment which does not comply with the locational restrictions or which does not contain certain specified regulation size sports facilities or which does not occupy a minimum floor area on a single floor as of October 1, 1975 shall terminate one year from the effective date of this amendment. This amortization provision will result in all premises

occupied by physical culture uses which do not conform to the above locational, sports facility or size regulations to terminate such use and thereafter be used in conformance with the district regulations. Any establishment failing to comply with amortization provisions would be subject to civil proceedings pursuant to Section 715 of the Real Property Actions and Proceedings Law to effectuate eviction.

An integral part of this amendment, for those areas outside the Clinton and Theatre Special Districts, is a City-wide moratorium on physical culture land uses. This moratorium will prohibit for one year any physical culture use from locating or relocating anywhere within the areas where they are presently allowed by the Zoning Resolution.

Studies will be commencing shortly to look at this problem on a City-wide basis. When other communities were contacted and briefed on the proposed legislation through their Planning Boards, they voted both to support these measures and to encourage similar measures in their area. The action of the one year City-wide moratorium both assures all communities that physical culture establishments will not relocate into other areas and allows the Mayor's Office of Midtown Planning and Development, in conjunction with the borough staffs of the City Planning Commission, one year to conduct studies and propose additional legislation for other areas of the City.

Again the Community Planning Boards, business association, organizations, and civic groups that have been briefed on the proposed Zoning Amendments fully accept that these measures along cannot turn around the decline of a specific area. They welcome and support these measures on the basis that the Amendments deal with one segment of a situation that can no longer be ignored.

Under the proposed legislation which tends to relate locational choice to genuine demand for physical culture facilities, the impact on legitimate enterprise should be minimal. The proposed zoning text is not a panacea, nor should it in any way be viewed as a substitute for vigorous enforcement of the penal law against criminality wherever found.

Concurrent with this amendment to the Zoning Resolution, City efforts to improve and upgrade Midtown and Times Square are underway. The objective is to ensure that the corporate headquarters functions, tourist functions, and retail functions of the Midtown area are strengthened. Specific actions in various areas have been undertaken. The Department of Sanitation has reassigned and reallocated men and equipment to improve physical appearance. The Economic Development Administration is working with businesses in the area to examine the possibility of obtaining small business loans to help upgrade or attract new businesses. The Department of Consumer Affairs is re-examining licensing procedures in the area to ensure conformance. The Department of Highways is giving special attention to the filling of potholes and the correction of highway defects in the area. The Traffic Department has been working to develop alternative traffic control schemes for the Midtown area. The Police Department is working closely with the business community to reduce street crime in the area. In addition, they are working closely with the Midtown Enforcement Task Force to ensure that businesses in the area are in conformance with all City statutes and regulations.

These actions, and the action of other City agencies fully illustrate how the amendments to the Zoning Ordinance are a part of a broad plan to improve and upgrade the overall Broadway-Times Square area. After further study and review, subsequent to the public hearing, the Commission determined that the following modifications were appropriate:

1) Section 11-50; the inclusion in the amendment of a provision making all provisions of the amendment inseparable from each other.
2) Sections 32-18, 83-03, 94-061, 95-081, 99-031 and 101-031; substituting massage establishments for the word masseurs to clarify the Commission's intent, and
3) Section 81-021 and 96-524; addition of specifications for regulation size sports facilities to clarify the Commission's intent.

The Commission determined that the amendments as modified are appropriate and adopted the following resolution, which is duly filed with the Secretary of the Board of Estimate, pursuant to Section 100 of the New York City Charter.

RESOLVED, by the City Planning Commission that the Zoning Resolution of the City of New York, effective as of December 15, 1961, and as subsequently amended, is further amended by changes relating to various sections concerning limitations on Use Group 9 Physical Culture and Health Establishments as follows:

11-50 SEPARABILITY

* * *

(c) The provisions of amendment CP-23116 affecting Sections 32-18, 83-03 94-061, 94-062, 95-081, 99-031, 101-031, 12-10, 81-01, 81-021, and 96-524 are an entirety: should any portion be found unenforcible or invalid for any reason then this entire amendment shall be null and void in its entirety. No court of competent jurisdiction nor any administrative body may apply any doctrine of separability or severability to save any portion of amendment CP- 23116 in the event any portion is found unenforcible or invalid.

* * *

32-18

Use Group 9 — Parking Requirement Category

* * *

A. Retail or Service Establishments

* * *

** Physical culture or health establishments, including gymnasiums, reducing salons, [masseurs] massage establishments or steam baths.

* * *

For a use in Use Group 9, marked with a cross no new such uses shall be permitted or established for a interim period of one year from the effective date of this amendment, except in the Special Theatre District and the Special Clinton District where special locational restrictions apply to those uses. However, this provision shall not apply to gymnasiums used exclusively for the following sports facilities: basketball, handball, squash and tennis.

* * *

ARTICLE VIII

SPECIAL PURPOSE DISTRICTS

A 42

* * *

CHAPTER 3 SPECIAL LIMITED COMMERCIAL DISTRICT

* * *

83-03

Use Group "L"

* * *

G. Retail or Service Establishments

* * *

+* 42. Physical culture or health establishments, including gymnasiums, reducing salons,[masseurs] massage establishments or steam baths.

* * *

+For a use in Use Group LC, marked with a cross, no new such uses shall be permitted or established for an interim period of one year from the effective date of this amendment. However, this provision shall not apply to gymnasiums used exclusively for the following sports facilities: basketball, handball, squash or tennis.

* * *

CHAPTER 4 SPECIAL SHEEPSHEAD BAY DISTRICT

* * *

94-061

Uses permitted by right

* * *

+ Physical culture or health establishments, including gymnasiums, reducing salons, [masseurs] massage establishments or steam baths.

* * *

+ For a use listed in Section 94-061 (Uses permitted by right), marked with a cross, no new such uses shall be permitted or established for an interim period of one year from the effective date of this amendment. However, this provision shall not apply to gymnasiums used exclusively for the following sports facilities: basketball, handball, squash or tennis.

* * *

94-062

Use Group 5B

* * *

C. Retail or Service Establishments

* * *

+* Physical culture or health establishments, including gymnasium, having a rated capacity of not more than 50 people.

* * *

+ For a use listed in Use Group 5b, marked with a cross, no new such uses shall be permitted or established for an interim period of one year from the effective date of this amendment. However, this provision shall not apply to gymnasiums used exclusively for the following sports facilities: basketball, handball, squash or tennis.

* * *

CHAPTER 5 SPECIAL TRANSIT LAND USE DISTRICT

* * *

95-081

Use Group T

* * *

+* 39. Physical culture or health establishments, including gymnasiums, reducing salons, [masseurs] massage establishments or steam baths.

* * *

+ For use in Use Group T, marked with a cross, no new such uses shall be permitted or established for an interim period of one year from the effective date of this amendment. However, this provision shall not apply to gymnasiums used exclusively for the following sports facilities: basketball, handball, squash or tennis.

* * *

CHAPTER 9 SPECIAL MADISON AVENUE DISTRICT

* * *

99-031

Use Group MP

* * *

B.

1. RETAIL OR SERVICE ESTABLISHMENTS

* * *

+15. *Physical culture or health establishments, including gymnasiums, reducing salons, [masseurs] massage establishments or steam baths.

* * *

+ For a use listed in Use Group MP, marked with a cross, no new such uses shall be permitted or established for an interim period of one year from the effective date of this amendment. However, this provision shall not apply to gymnasiums used exclusively for the following sports facilities: basketball, handball, squash or tennis.

ARTICLE X

SPECIAL PURPOSE DISTRICTS

* * *

CHAPTER 1 SPECIAL YORKVILLE-EAST 86TH STREET DISTRICT

* * *

101-031

Use Group Y

* * *

D. Retail or Service Establishments

* * *

+* 41. Physical culture or health establishments, including gymnasiums, reducing salons, [masseurs] massage establishments or steam baths.

* * *

\+ For a use listed in Use Group Y, marked with a cross, no new such uses shall be permitted or established for an interim period of one year from the effective date of this amendment. However, this provision shall not apply to gymnasiums used exclusively for the following sports facilities: basketball, handball, squash or tennis.

12-10 DEFINITIONS

* * *

Special Theatre District

The "Special Theatre District" is a Special Purpose District designated by the letter "T", in which special regulations set forth in Article VIII, Chapter 1 apply to developments containing one or more legitimate theatres and all other developments, enlargements, extensions, changes of use, establishment of new uses, and the continuation of existing uses. The Special Theatre District appears on the zoning maps superimposed on other districts, and its regulations supplement those of the district on which it is superimposed.

* * *

Article VIII

Special Purpose Districts

Chapter 1 Special Theatre Districts

* * *

81-01

Definition (repeated from Section 12-10)

Special Theatre District

The "Special Theatre District" is a Special Purpose District designated by the letter "T", in which special regulations set forth in Article VIII, Chapter 1 apply to developments containing one or more legitimate theatres and all other developments, enlargements extensions, change of use, establishment of new uses, and the continuation of existing uses. The Special Theatre District appears on the zoning maps superimposed on other districts, and its regulations supplement those of the districts on which it is superimposed.

* * *

Special use regulations

When permitted by the underlying district regulations, physical culture or health establishments, however described or advertised, including without limitation, reducing salons, massage establishments or steam baths, are restricted to locations in transient hotels with 200 rooms or more provided that no such use and no accessory business sign fronts upon a street or public way and community facilities or buildings predominantly occupied by a community facility. Where such physical culture or health establishments contain any of the following regulation size* sports facilities: basketball courts, handball courts, squash courts, tennis courts or a swimming pool of a minimum 1,500 sq. ft., such location restriction shall not apply. Where a use is rendered non-conforming by such locational restrictions, and where such use does not occupy at least 4,500 sq. ft. on one floor as of October 1, 1975, such use shall terminate not later than one year after the effective date of such restriction, and thereafter the space formerly occupied by such use shall be used only for a conforming use.

* * *

*Regulation size shall mean:

Basketball Courts - width 50 feet; Length 84 feet, clear height 20 feet minimum. Surrounding the perimeter there shall be a minimum of 3 feet of clear open space.

Handball Courts - Width 55 feet at back end; Length 50 feet; clear height 23 feet

Squash Courts - Width 25 feet; length 45 feet; clear height 20 feet.

Tennis Courts - Width 60 feet; length 120 feet; clear height 32 feet at net, 8 feet at wall lines.

* * *

* * *

Chapter 6 Special Clinton District

* * *

96-524

Special use regulations

When permitted by the underlying district regulations, physical culture or health establishments, however described or advertised, including without limitation, reducing salons, massage establishments or steam baths, are restricted to location in transient hotels with 200 rooms or more provided that no such use or accessory business sign fronts upon any street or public way and community facilities or buildings predominantly occupied by a community facility. Where such physical culture or health establishments contain any of the following regulation size* sports facilities: basketball courts, bowling alleys, handball courts, squash courts, tennis courts or a swimming pool of a minimum 1,500 sq. ft., such locational restrictions shall not apply. Where a use is rendered non-conforming by such locational restrictions, and where such use does not occupy at least 4,500 sq. ft. on one floor as of October 1, 1975 such use shall terminate not later than one year after the effective date of such restriction, and thereafter the space formerly occupied by such use shall be used only for a conforming use.

* * *

*Regulation size shall mean:

Basketball Courts - Width 50 feet; length 84 feet, clear height 20 feet minimum. Surrounding the perimeter there shall be a minimum of 3 feet of clear open space.

Handball Courts - Width 55 feet at back end; length 50 feet; clear height 23 feet.

Squash Courts - Width 25 feet; length 45 feet; clear height 20 feet.

Tennis Courts - Width 60 feet; length 120 feet; clear height 32 feet at net, 3 feet at wall lines.

JOHN E. ZUCCOTTI, Chairman;
MARTIN GALLENT, Vice-Chairman,
GERALD R. COLEMAN, ALEXANDER COOPER,
GORDON J. DAVIS, SYLVIA DEUTSCH, CHESTER RAPKIN, Commissioners.

AFFIDAVIT OF EDWARD TRICOMI IN SUPPORT
OF CROSS MOTION TO DISMISS COMPLAINT

PAGE 49-51

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

REGAL HEALTH SPA, INC.,

Plaintiff,

-against-

JEREMIAH T. WALSH, et al.,

Defendants.

----------X

AFFIDAVIT

77 Civ. 1326

(L. M.)

STATE OF NEW YORK]
] ss.:
COUNTY OF NEW YORK]

EDWARD TRICOMI, being duly sworn, deposes and says:

1. I am a Construction Inspector of the Department of Buildings of the City of New York and I submit this affidavit in opposition to the plaintiff's motion for a preliminary injunction and in support of the municipal defendants' cross-motion to dismiss the complaint.

2. The Commissioner of the Department of Buildings and his subordinates have been accorded prime responsibility for the enforcement of zoning regulations within the City of New York by Section 71-00 of the Zoning Resolution of the City of New York and Section 643a-12.0 of the New York City Administrative Code.

3. I have conducted administrative inspections of the premises located at 133 West 45th Street, Borough of Manhattan,

City and State of New York and doing business under the name "Her Place" on a number of occasions.

4. During the course of those inspections it has been apparent that the premises have been used or occupied as a health club or massage establishment, which establishments are classified within use group 9 (physical culture establishments) under the Zoning Resolution of the City of New York.

5. On January 8, 1976 the Board of Estimate of the City of New York amended the Zoning Resolution of the City of New York. That amendment, known as Section 81-021, required all physical culture establishments within the Special Theater District to amortize within one year unless such establishments conform to certain locational requirements set forth therein. The plaintiff's business premises fall within the district affected by Section 81-021 of the Zoning Resolution of the City of New York.

6. On March 9, 1977 I conducted an inspection of the subject premises. I observed that the premises were still being used or occupied as a physical culture establishment and that the premises failed to meet the locational requirements of the statute. Accordingly, at the conclusion of my inspection I issued Violation Order No.030977 CMTF7PL for violation of Sections 32-18 and 81-021 of the Zoning Resolution of the City of New York and served the same upon one Sari Rucker, the person in charge or control of the subject premises. A copy of that Violation Order is annexed hereto as Exhibit "A".

7. On March 21, 1977 I conducted a follow-up inspection at the subject premises. At that time I observed that the premises were still being used or occupied as a physical culture establishment in violation of the Zoning Resolution and the provisions of Violation Order No. 030977 CMTF7PL. Accordingly, at the conclusion of my inspection, I issued Summons No.65-131705-2 to the plaintiff REGAL HEALTH SPA, INC. and served the same upon one Sari Rucker, the person in charge or control of the subject premises. A copy of that summons, returnable in the Criminal Court of the City of New York on April 20, 1977, is annexed hereto as Exhibit "B".

Edward Tricomi
EDWARD TRICOMI

Sworn to before me this
24th day of March, 1977.

Alan M. Swiedler
ALAN M. SWIEDLER
Notary Public, State of New York
No. 41-4623591
Qualified in Queens County
Commission Expires March 30, 1978

63M-730066 (79)
B FORM 30 (REV. 7/76)

A 52

THE CITY OF NEW YORK
HOUSING AND DEVELOPMENT ADMINISTRATION
DEPARTMENT OF BUILDINGS

MANHATTAN
Municipal Building
New York, N.Y. 10007
566-2484

BRONX
1932 Arthur Avenue
Bronx, N.Y. 10457
583-5520

BROOKLYN
Municipal Building
Brooklyn, N.Y. 11201
643-5925

QUEENS
126-06 Queens Blvd.
Kew Gardens, N.Y. 11415
520-3423

RICHMOND
Borough Hall
St. George, N.Y. 10301
390-5204

Joseph and Tilly Freeman (owner)
347 Ocean Parkway
Brooklyn, N.Y. 11218

Regal Health Spa (lessee)
c/o Tates, Daniella
212 E. 77th St (Apt 1H)
New York, N.Y. 10021

Sarah M Rucker
126 Riverside Dr. Apt 5A
N.Y.C. N.Y. 10024

You are hereby notified that there exists a violation in the subject premises as described below.

You are hereby directed to remove this violation, pursuant to Section C26-86.5, subd. d and/or Section 643a-8.0 of Chapter 26 of the Administrative Code.

All inquiries and reference to this violation should be directed to the Violation Section in the respective borough.

(If this violation is not corrected within ten days, you may be summoned to appear in the Criminal Court.)

Cornelius F. Dennis
BOROUGH SUPERINTENDENT

Jeremiah T Walsh
COMMISSIONER

Her Place

Location 133-26 45th St 2nd fl.			Boro Mann	Violation Number				
				Date	Type	Dist.	No.	Quad.
Construction NEP	No. of Stories	Block 998	Lot 116	3/9/77	C	MTE	7	PL
Occupied at Time of Inspection as: Physical Culture Establishment				Complaint No.		Docket No.		
Section(s) Violated 32-18 and 81-021			of the Zoning Resolution					

DESCRIPTION OF VIOLATION: Maintenance of a physical culture establishment rendered non-conforming by locational, functional, and size restrictions adopted 1/8/76, and continuing such non-conforming use for more than one year after the effective date of such restriction.

Remedy: Discontinue all non-conforming uses forthwith.

Filed By: Edward Pacconi

BRIBERY IS A CRIME:

A person who gives or offers a bribe to any employee of the City of New York, or an employee who takes or solicits a bribe, is guilty of a felony punishable by imprisonment for up to seven years or a fine, or both. Penal Law, Section 200.00 and 200.10.

A PARKING VIOLATIONS BUREAU — B STATE ADM. ADJ. BUR. — C CRIMINAL COURT

PRINT ALL ENTRIES•USE BALL POINT PEN•PRESS HARD

COPY OF NOTICE OF VIOLATION

COMPLAINT / INFORMATION

THE PEOPLE OF THE STATE OF NEW YORK VS

65 4/0 REGAL HEALTH SPA 131705-2

LAST NAME FIRST NAME INITIAL

SARI M RUCKER

STREET ADDRESS 126-RIVERSIDE DRIVE

CITY(as shown on license) STATE ZIP NO.

N.Y.C. N.Y.

LICENSE OR IDENTIFICATION NUMBER

STATE	TYPE OF LICENSE	DATE EXPIRES	SEX	DATE OF BIRTH MO	DAY	YR	OPERATOR OWNS VEHICLE ☐ YES ☐ NO

THE OPERATOR OR REGISTERED OWNER OF VEHICLE DESCRIBED BELOW

PLATE	PLATE TYPE	STATE	DATE EXPIRES MO	YR
YEAR AND MAKE OF VEHICLE	COLOR	BODY TYPE		

THE PERSON DESCRIBED ABOVE IS CHARGED AS FOLLOWS

PLACE OF OCCURRENCE: 133-11-45th St 2nd fl. — PRECINCT OF OCCURRENCE:

COUNTY OF OFFENSE: N.Y. — DATE OF OFFENSE: 3/21/77 — TIME: 11 AM PM — IN VIOLATION OF SECTION: 32-18 and SUBD. 81-021 OF

TRAFFIC REGULATIONS — VEHICLE AND TRAFFIC LAW — ADMINISTRATIVE CODE — OTHER LAW: Zoning Resolution

A PVB — PARKING — CODE — PARKING METER NO — FEET FROM HYDRANT

B DMV — MOTOR VEHICLE TRAFFIC INFRACTION

SPEEDING MPH — IN MPH ZONE — DISOBEY TRAFFIC CONTROL DEVICE: SIGN, SIGNAL, PAVEMENT MARK — UNLIC OPER — UNREG VEHICLE — UNINSURED VEHICLE

DESCRIPTION OF TRAFFIC INFRACTION IF NOT SHOWN ABOVE

C CRIMINAL COURT — OTHER OFFENSE (INCLUDING TRAFFIC MISDEMEANOR)

Failure to Comply (ZONING)
6101 #030977 CMTF 7PL

SCHEDULED FINE $2 $10 $15 $25 $35 OTHER $

THE PERSON DESCRIBED ABOVE IS SUMMONED TO APPEAR AT — IF CRIMINAL COURT INDICATE PART — SUMMONS PART

LOCATED AT 346-Broadway — COUNTY N.Y.

DATE OF APPEARANCE: 20 DAY OF APR 19 77 AT — 8:30 AM / 10:30 AM / 1:00 PM / 2:30 PM

I PERSONALLY OBSERVED THE COMMISSION OF THE OFFENSE CHARGED ABOVE. FALSE STATEMENTS MADE HEREIN ARE PUNISHABLE AS A CLASS A MISDEMEANOR PURSUANT TO SECTION 210.45 OF THE PENAL LAW AFFIRMED UNDER PENALTY OF PERJURY.

RANK/SIGNATURE OF COMPLAINANT: Edward Trecoma — SQUAD — COMMAND

COMPLAINANT'S NAME(PRINTED): Edward Trecoma — TAX REGISTRY NO: 42514 — AGENCY: Bldg

FOLLOW INSTRUCTIONS ON REVERSE SIDE

N.Y.S. DEPT. OF MOTOR VEHICLES — B ADMINISTRATIVE ADJUDICATION BUR.

A PARKING VIOLATIONS BUREAU

DO NOT USE THIS MARGIN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REGAL HEALTH SPA, INC.,

Plaintiff,

-against-

JEREMIAH T. WALSH, as Commissioner of the New York City Department of Buildings, PAUL O'DWYER, as President of the New York City Council, HONORABLE LOUIS J. LEFKOWITZ, Attorney General of the State of New York and HONORABLE HUGH CAREY, as Governor of the State of New York,

Defendants.

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

77 Civ. 1326 (L.F.M.)

S I R :

PLEASE TAKE NOTICE, that on the annexed memorandum of law, the undersigned will move this Court at the U.S. Courthouse, Foley Square, New York, New York, on March 25, 1977 at 2:15 o'clock in the afternoon or as soon thereafter as counsel can be heard, that plaintiff's complaint in this action be dismissed as against defendants Louis J. Lefkowitz, Attorney General of the State of New York and Hugh Carey as Governor of the State of New York for failure to state a claim on which relief can be granted pursuant to FRCP 12(b)6.

Dated: New York, New York
March 24, 1977

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Pro Se and as attorney
for Hugh Carey as Governor
of the State of New York
By

PATRICIA C. ARMSTRONG
Assistant Attorney General
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212)488-7327

TO: ANTHONY V. LOMBARDINO, ESQ.
125-10 Queens Boulevard
Kew Gardens, New York 11415

JOHN RUSSELL, ESQ.
Office of the Corporation Counsel
Municipal Building
New York, New York 10007

AFFIDAVIT OF LEE ROGERS IN OPPOSITION
TO DEFENDANT JEREMIAH T. WALSH TO DISMISS
COMPLAINT, ETC.

PAGE 55-58

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REGAL HEALTH SPA, INC.,

77 CIV 1326

Plaintiff

- against -

JEREMIAH T. WALSH, AS COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF BUILDINGS, PAUL O'DWYER, AS PRESIDENT OF THE NEW YORK CITY COUNCIL, HONORABLE LOUIS J. LEFKOWITZ, AS ATTORNEY GENERAL FOR THE STATE OF NEW YORK, AND HONORABLE HUGH CAREY, AS GOVERNOR OF THE STATE OF NEW YORK,

Defendant.

AFFIDAVIT IN OPPOSITION

STATE OF NEW YORK :
SS.:
COUNTY OF QUEENS :

LEE ROGERS, BEING DULY SWORN, DEPOSES AND SAYS:

That she is the President of Plaintiff Corporation and respectfully submits this Affidavit in Opposition to the Motion of Defendant, JEREMIAH T. WALSH, Commissioner of the New York City Department of Buildings, to dismiss the Complaint on the alleged grounds that this Court should abstain from entertaining this proceeding.

I have been advised by my Attorney, ANTHONY V. LOMBARDINO, that the General Rule of Federal Courts to abstain from interferring with State Criminal or Quasi Criminal Statutes is not applicable to this case in view of the fact that the Statute being challenged is a Zoning Resolution, not a Criminal Statute.

I have also been advised by my Attorney that the Rule of abstention does not apply, " In those cases where the District Court properly finds that the State proceeding is motivated by a desire to harass or is conducted in bad faith, or where the challenged statute is flagrantly and patently violative of express constitutional prohibition in every clause, sentence or paragraph, and in whatever manner and against whom ever an effort might be made to apply it." The Zoning Resolution under challenge forbids Health Clubs that do not possess swimming pools or other similar facilities in certain areas where they are permitted, if they are so equipped. Such Statute is clearly discriminatory, and no State Court construction could possibly enable it to survive. Therefore, this Court should not abstain from where the question of Constitutional Law is so apparent.

I have also been advised by my Attorney that this Court will not abstain where a traditional equity showing of irreparable damage is made. Should Zoning Resolution 81.021 not be declared unconstitutional, Plaintiff will suffer irreparable injury. An investment of $15,000.00 was made to purchase the Leasehold. Thousands of Dollars have gone into improvements. Should the business be closed, irreparable damage will flow.

It is true, that violation of the Zoning Resolution is an offense under New York Law. However, it is strongly urged that the Penal Law is a clumsy vehicle to enforce a Zoning Resolution. The most that can be accomplished, is imposing a fine upon an alleged violator. The only way that the Penal Law can be effective is for the State to employ it as a tool of harassment by serving a Summons daily. However, where the State employs the Penal Law as a tool of harassment, I have been advised by Counsel that Federal Courts will then accept jurisdiction over a Federal Constitutional question. Therefore, the cases that seem to indicate that Federal Courts will abstain where a State Penal Statute is challenged are inappliable here for the additional reason that the Penal Law is an ineffective means of vindicating a Zoning Resolution.

WHEREFORE, deponent prays that the Motin of said Defendant for the Federal Court to abstain in this matter be denied for the reasons set forth in this Affidavit herein and for such other and further relief as to thisCourt may be deemed just and proper.

DATED: KEW GARDENS, NEW YORK
MARCH 30,1977.

S/S LEE ROGERS
LEE ROGERS

Sworn to before me this
30 day of March,1977.

NOTARY PUBLIC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

REGAL HEALTH SPA, INC.,

Plaintiff,

-against-

JEREMIAH T. WALSH, as Commissioner of the New York City Department of Buildings, PAUL O'DWYER, as President of the New York City Council, HONORABLE LOUIS J. LEFKOWITZ, as Attorney General for the State of New York, and HONORABLE HUGH CAREY, as Governor of the State of New York,

Defendants.

----------X

ORDER

&

JUDGMENT

77 Civ. 1326

This cause came on for hearing on April 6, 1977 before the Honorable Lloyd F. McMahon, District Judge, upon the plaintiff's motion for a preliminary injunction and upon the cross-motion of the defendant JEREMIAH T. WALSH to dismiss the complaint on the ground that the complaint fails to state a claim upon which relief can be granted.

Upon consideration of the record before it, this Court finds that there presently is pending in the courts of the State of New York a criminal action wherein the plaintiff has the opportunity to litigate its constitutional claims, that the plaintiff has by virtue of that pending state criminal action an

adequate remedy at law and that the plaintiff has failed to allege or show any special circumstances to warrant federal interference therein by means of injunctive or declaratory relief. The zoning ordinance challenged in this action is one which is of great importance to the City of New York and this Court shall decline to exercise jurisdiction under the principles of comity and federalism recognized in Younger v. Harris, 401 U.S.37(1971), Samuels v. Mackell, 401 U.S.66(1971), Hicks v. Miranda, 422 U.S. 332(1975) and Juidice v. Vail,45 U.S.L.W. 4269. Accordingly, it is

ORDERED, ADJUDGED AND DECREED that this action be dismissed for failure to state a claim upon which relief can be granted, without costs or disbursements.

Dated: April 12, 1977.

U.S.D.J.

Service of ~~three~~ Two (2) copies of the [illegible]
is hereby admitted

this 6th day of July 1977

W. Bernard Richland

Attorney(s) for Plaintiff-Appellant

by: David H. Coon